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In the
Supreme Court of the United States
OCTOBER TERM, 1998

JAMES B. HUNT, JR., *et al.*,
Appellants,

and

ALFRED SMALLWOOD, *et al.*,
Intervenor-appellants,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

APPELLEES' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Should the constitutionally mandated principles of *Shaw v. Reno* be reaffirmed and fully enforced in the review of a redistricting plan required in order to remedy past violations of equal protection?

2. In granting summary judgment did the district court properly decide that the bizarrely shaped, race-based District 12 failed to meet the requirements of *Shaw v. Reno*?

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STATEMENT OF THE CASE

A Brief History of North Carolina's Racial Gerrymandering

This appeal is yet another of the never-ending efforts by the appellants and their allies to perpetuate racial gerrymanders in North Carolina. To that end, they have employed specious arguments,[1] posed undue procedural objections,[2] and used "post hoc rationalizations" and euphemisms to mask racial motives.[3]

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[1]For example, in *Shaw v. Hunt*, 517 U.S. 899 (1996) (hereinafter "*Shaw II*"), the Court described as "singularly unpersuasive" the State's claim that the Twelfth District was "narrowly tailored." *Id.* at 917.

[2]Thus, despite the clear intent of this Court's opinion in *Shaw v. Reno*, 509 U.S. 630 (1993) (hereinafter "*Shaw I*"), the State continued to claim that the plaintiffs in *Shaw* had no standing under the Equal Protection Clause because they were white; and a similar argument has now been advanced in the amicus brief of the American Civil Liberties Union. ACLU Br. 14-16. Moreover, in the present appeal, appellants initially asserted that an order in the *Shaw* litigation which approved the 1997 redistricting plan precluded the claim for relief of Cromartie and his fellow plaintiffs – even though (a) appellants did not allege preclusion in their answer or otherwise assert it until filing their appeal; (b) no privity existed to support claim preclusion or collateral estoppel; and (c) the preclusion argument was forestalled by the language of the district court's order in *Shaw*. This contention, which was one of three advanced in the appellants' jurisdictional statement, has apparently now been abandoned, and it is also disavowed by the amicus brief of the United States.

[3]"Post hoc rationalizations" was the term used by the three-judge district court in *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993) to characterize race-neutral defenses of Louisiana's racial gerrymanders by experts, some of whom also defended North Carolina's racial gerrymanders in the *Shaw* litigation. "Minority-opportunity" district was a euphemism used in oral argument to defend the racially gerrymandered Texas districts that were the subject of *Bush v. Vera*, 517 U.S. 952 (1996).

The State's history of stonewall defense of its racial gerrymanders makes its contentions on this appeal seem especially hollow.

To analyze properly the present appeal requires an examination of the history of North Carolina's racial gerrymandering,[4] which begins with a redistricting plan adopted in 1991 that contained only one majority-minority district. After the Department of Justice denied preclearance pursuant to its "maximization policy," that plan was replaced in January 1992 by a redistricting plan that had two majority-black districts. When this plan first was attacked by Republicans as a political gerrymander,[5] the State claimed that its irregular shape reflected the demands of the Civil Rights Division. When the *Shaw* plaintiffs attacked the plan a few weeks later because it was a racial gerrymander, the State never denied that it was race-based. Instead, the racial gerrymander was defended – even in argument before this Court – as being race-based for benign reasons and therefore not in violation of the Equal Protection Clause. Moreover, the State insisted that the *Shaw* plaintiffs lacked standing to make an Equal Protection claim because they all were white.

When this Court rejected these defenses in *Shaw I* and remanded the case for trial, the State adroitly changed its

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[4]In *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252, 267 (1977), the Court noted that "the historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes."

[5]*See Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992).

position and contended that the 1992 plan actually was not race-based. At trial and on appeal, reliance was placed on novel concepts – such as "functional compactness" – to establish that the two majority-black districts had been created because of factors other than race and therefore the principles enunciated in *Shaw I* had not been violated. Fortunately, the State's "post hoc rationalizations" were rejected in *Shaw II*[6] and further use of the 1992 plan was prohibited. However, despite strenuous efforts by the *Shaw* plaintiffs to persuade either the General Assembly or the district court to put a constitutional plan into effect in time for the 1996 elections, those elections took place in November 1996 pursuant to the same "bizarre" plan that this Court had held unconstitutional several months earlier in *Shaw II*.[7] On March 31, 1997, immediately before the deadline set by the district court, the General Assembly enacted a new redistricting plan, which was then precleared by the Civil Rights Division. Despite a

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[6]These rationalizations were impossible to reconcile with the shape and demographics of the two majority-black districts, which linked large concentrations of African-Americans by narrow "white corridors," utilized "point contiguousness," split numerous precincts along racial lines, and violated nearly every race-neutral principle of redistricting. *See Shaw II.*

[7]Ironically, in the Texas redistricting litigation – which had commenced some months after suit was brought in North Carolina and which was decided by this Court at the same time as *Shaw II* – the three-judge district court put a new plan into effect for the 1996 election. Of thirty congressional districts in Texas, the new plan altered thirteen districts – more than the entire number of districts in North Carolina. Yet North Carolina's legislature considered it impossible to enact a new plan for the 1996 elections and, by divided vote, the district court declined to intervene.

statement of opposition by the *Shaw* plaintiffs,[8] the district court approved the plan.

In *Shaw II* this Court ruled only on the challenge to the Twelfth District of the 1992 plan because none of the plaintiff-appellants lived in the First District. Therefore, Martin Cromartie and two other residents of the First District filed a complaint on July 3, 1996, which alleged that this district also violated the Equal Protection Clause. Their action, however, was stayed by consent to await enactment by the General Assembly of a new redistricting plan. After the district court in *Shaw* approved the 1997 plan only on a limited basis,[9] an amended complaint was filed in the *Cromartie* action. *See* Joint Appendix (hereinafter "J.A.") 7. It sought a temporary and permanent injunction against use of the 1997 plan. Relying on the data available through the General Assembly's public access computer – data which had been submitted to the Department of Justice in the General Assembly's effort to obtain preclearance for the 1997 plan – the amended complaint not only attacked the "new" First District but also alleged that the Twelfth District in the 1997 plan was composed of parts of

[8]The five *Shaw* plaintiffs all lived in Durham County, which the General Assembly had removed from the Twelfth District. Under *Shaw II* they now lacked standing to challenge that district, although they asserted that it still was an unconstitutional racial gerrymander.

[9]See Memorandum Opinion in *Shaw v. Hunt*, in Appendix to Jurisdictional Statement (hereinafter J.S. App.) 159a. The Court specifically stated that because of the "dimensions of this civil action as that is defined by the parties and the claims properly before us . . . we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not – cannot – run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12." J.S. App. 167a.

six counties[10] and that each of those counties

> was divided along racial lines and for a predominantly racial motive. Of Mecklenburg County's black population, 84% was placed in the Twelfth District and 16% in the Ninth; but of its white population 27% was placed in the Twelfth District and 73% in the Ninth. Of Forsyth County's black population, 65% was placed in the Twelfth District and 35% in the Fifth District; but of its white population, 8% was placed in the Twelfth District and 92% in the Fifth. Of Guilford County's black population, 76% was placed in the Twelfth District and 24% in the Sixth; but of its white population, 25% was placed in the Twelfth District and 75% in the Sixth. Of Iredell County's black population, 63% was placed in the Twelfth District and 37% in the Tenth; but of its white population 37% was placed in the Twelfth District and 63% in the Tenth. Of Rowan County's black population, 66% was placed in the Twelfth District and 34% in the Sixth; but of its white population, 23% was placed in the Twelfth District and 77% in the Sixth. Of Davidson County's black population 80% was placed in the Twelfth District and 20% in the Sixth District; but of its white population, 49.6% was placed in the Twelfth District and 50.4% in the Sixth District. The Twelfth District is the only congressional district which under the March 1997 plan

[10]Some plaintiffs had been added who lived in District 12 and therefore had standing under *Shaw II*.

contains no county which is not divided.[11]

After the State defendants had answered, the three-judge district court – of which only one member, Chief Judge Richard L. Voorhees, had participated in the *Shaw* litigation[12] – conducted a hearing on March 31, 1998. Soon thereafter it granted summary judgment for the plaintiffs as to the "new" Twelfth District; and the court permanently enjoined use of the 1997 plan for any primary or general election.[13] However, the court refused summary judgment for either the plaintiffs or defendants as to the 1997 plan's First District. The defendants then unsuccessfully sought a stay from the district court and thereafter from this Court. *See Hunt v. Cromartie* (No. A-793), 118 S. Ct. 1510 (1998). Later, still another fruitless effort was made by the State to delay the effect of the injunction as to six of the congressional districts – namely, the First District and five others in the eastern part of North Carolina.

The district court allowed the General Assembly an opportunity to enact still another plan – which was forthcoming

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[11]*See* J.A. 16-17. As the amended complaint also noted, Mecklenburg and Guilford Counties – two of North Carolina's most populous counties – had never been in the same congressional district from 1793 until the 1992 redistricting plan was enacted; nor had Mecklenburg been in the same district with Forsyth County – another populous county – during any of this same period. *See id.* See also the corresponding admissions in appellants' answer. *Id.* at 30-31.

[12]During the *Shaw* litigation Chief Judge Voorhees consistently dissented from rulings which supported North Carolina's flagrant racial gerrymander. *See, e.g., Shaw v. Hunt*, 861 F. Supp. 408, 477 (E.D.N.C. 1994) (Voorhees, C.J. dissenting), reversed by *Shaw II*.

[13]The 1997 plan was never used in an election. The 1992, 1994, and 1996 elections were conducted under the 1992 plan while the 1998 election took place under the 1998 plan.

in May 1998. Under this plan, the First District was left unchanged; but instead of splitting six counties, the Twelfth District now contained one entire county and split only four. The percentage of African-Americans in this district was also reduced from 46.67% to 35.58%, although the Twelfth District still linked two major urban concentrations of African-Americans – one in Charlotte and the other in Winston-Salem. The 1998 plan contained a unique provision that it would be "effective for the elections for the years 1998 and 2000 *unless the United States Supreme Court reverses the decision holding unconstitutional G.S. 163-201(a) as it existed prior to the enactment of this act.*"[14]

The plaintiffs informed the district court that they opposed the 1998 plan because – even though an improvement on its predecessors – the plan still was an unconstitutional racial gerrymander. However, the court authorized the State to use this plan for the 1998 congressional primaries – which were deferred until September – and for the general election on November 3, 1998. *See* J.S. App. 175a. The district court prescribed a discovery schedule in preparation for a trial as to the constitutionality of the First District and stated that it also would consider any additional evidence that plaintiffs might offer with respect to the Twelfth District's unconstitutionality. After appellants filed their jurisdictional statement, the district court, by consent of all the parties, stayed proceedings to await the outcome of this appeal. Meanwhile, Cromartie and the other appellees in this case appealed the order which allowed

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[14]*See* N.C. Sess. Laws 1998-2, enacted May 21, 1998 (emphasis added), which is discussed in Appellees' Motion to Dismiss or, in the Alternative, to Affirm at 10. Under this unique provision, if this Court "reverses the decision" below, the more race-based 1997 plan will come into effect for elections in the year 2000, and the Representatives elected on November 3, 1998 will have their districts changed.

the 1998 plan to be used. By their appeal in *Cromartie v. Hunt* (No. 98-450), they seek resolution of several issues also present in this appeal.

SUMMARY OF ARGUMENT

The principles established by *Shaw v. Reno* should be given full effect – not overturned, as some of the amici have urged, or unduly limited, as appellants and all their amici seek. To subject race-based congressional districts to strict scrutiny – as required by *Shaw* and the Equal Protection Clause – assures that racial stereotypes will not mar the electoral process, that members of Congress will not feel an obligation to represent only voters of their own race, and that voters of one race will not feel that they lack a voice if they are represented in Congress by someone of another race. *Shaw* has enhanced the confidence of voters in the electoral process. Fears that it might diminish racial diversity proved groundless.[15]

Because application of the principles of *Shaw v. Reno* produces a more meaningful electoral process and reduces the incentive for racial stereotyping and polarization, those principles should be vigorously applied, rather than left unenforced. Thus, contrary to the position taken by the General Assembly in enacting and defending the 1997 plan, race-based

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[15]Contrary to predictions by some *Shaw* critics, every African-American who had been originally elected to Congress from a majority-minority district was re-elected in redrawn districts – except for Representative Cleo Fields, who, instead of seeking re-election, ran for governor of Louisiana. In North Carolina, the two African-Americans, Melvin Watt and Eva Clayton, who had been elected three times under the 1992 plan, were handily reelected on November 3, 1998 even though each ran in a district with a lower percentage of black voters than before. Such results demonstrate that African-American candidates do not need a majority-black district to be elected if they campaign vigorously to gain support of all voters, rather than only voters of their own race.

districts – whether or not majority-minority – must be eliminated unless they pass the test of strict scrutiny. Likewise, the Court should not allow evasion of the *Shaw* requirements by the resort to amorphous concepts like "functional compactness" and by the artful phrasing of legislative history and affidavits. Especially in dealing with a remedial plan that the General Assembly purportedly designed to correct the past constitutional defects, the Court should insist that all "vestiges" of the racial gerrymander be eliminated in order to assure that public confidence in the electoral process is restored and that judicial rulings are not circumvented. State appellants' plea for further guidance is surprising because the history of racial gerrymandering in North Carolina reveals that they have consistently disregarded guidance that has already been provided.

The appellants and amici contend that the district court failed properly to apply Federal Rule of Civil Procedure 56(c) in ruling on the motions for summary judgment submitted by plaintiffs and defendants. The language of the court's Memorandum Opinion refutes this argument. The district court's opinion marshals the uncontroverted material facts to demonstrate conclusively that the 1997 version of District 12 was the result of a predominantly racial motive on the part of the legislature. Although "appearances" are not conclusive as to the motive for drawing a particular district, the shape of the Twelfth District, *see* map, J.S. App. 59a – especially when juxtaposed against the race-based Twelfth District of the 1992 plan, *see* map, J.S. App. 61a – is strong evidence as to the racial motive for the plan. The demographics of the district and its violation of traditional race-neutral principles are additional evidence. Finally, the history of the plan – including some significant contradictions between the plan and the stated reasons for its enactment – constitutes still further evidence of the racial motive. The uncontroverted evidence was more than enough to

warrant summary judgment for the plaintiffs.

Although the issue was not raised in the Jurisdictional Statement or in the State appellants' brief, intervenor-appellants and some of the amici contend that the district court should have engaged in "strict scrutiny" of the race-based District 12. Nothing in the record suggests that the district was created in response to a "compelling governmental interest" or that it embodied "narrow tailoring." Indeed, for appellants to claim that the district met strict scrutiny would be inconsistent with their insistence that there had been no racial purpose in its design. Moreover, incumbent protection and maintaining partisan balance – the claimed reasons for the 1997 plan - could not be considered "compelling" governmental interests; and to assert that the "new" Twelfth District was "narrowly tailored" would defy this Court's treatment of its predecessor in *Shaw II*.[16]

Even if the district court had not found specifically from the uncontroverted facts that race was the General Assembly's predominant motive for drawing District 12, the summary judgment was proper. Approval of a remedial plan requires close judicial scrutiny to assure that any unconstitutional taint of the replaced plan has been eliminated. When, as with North Carolina's District 12, the "new" district admittedly preserves the "core" of the original district, retains many "appearances" of that district, seeks to guarantee reelection of incumbent elected from the replaced district, and violates "traditional districting principles," it cannot be approved.

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[16]The General Assembly's later enactment of the less race-based, more compact 1998 plan for the same claimed purpose of incumbent protection and maintaining partisan balance also indicates that these stated purposes are disguises for a predominant racial motive.

ARGUMENT

I. THE CONSTITUTIONALLY MANDATED PRINCIPLES OF *SHAW V. RENO* SHOULD BE REAFFIRMED AND GIVEN FULL EFFECT.

A. *Shaw v. Reno* Properly Applies the Equal Protection Clause to Racial Gerrymanders.

Some of the amici, such as the American Civil Liberties Union, wish this Court to overrule *Shaw v. Reno* in anticipation of "the millennium census and the next round of redistricting." ACLU Br. 4. Apart from the importance of stare decisis in assuring respect for our legal system,[17] the overruling of this landmark decision would be properly perceived as a dismaying step backwards. Public confidence in the integrity of the electoral process would be destroyed by such a repudiation of the Court's perceptive observation in *Shaw I* that:

> [W]e believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district

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[17]In *Vera*, Justice O'Connor wrote:

> Our legitimacy requires, above all, that we adhere to stare decisis, especially in such sensitive political contexts as the present, where partisan controversy abounds. Legislators and district courts nationwide have modified their practices – or, rather, reembraced the traditional districting practices that were almost universally followed before the 1990 census – in response to *Shaw I*. Those practices and our precedents, which acknowledge voters as more than mere racial statistics, play an important role in defining the political identity of the American voter.

517 U.S. at 985.

> individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group – regardless of age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls.

Shaw I, 509 U.S. at 647. A license would be granted to resurrect the distorted race-based districts for which *Shaw* spelled doom.[18] Apparent approval would be given to the polarizing view held by some legislators that their primary responsibility is to represent voters of their own race.[19] If *Shaw I* had not been decided, the Civil Rights Division would have continued to enforce its "maximization policy," which for Section 5 preclearance required states to create majority-black districts in any way possible – no matter how contrary to traditional redistricting principles. *See Miller v. Johnson*, 515

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[18]Among the bizarre districts for which *Shaw v. Reno* sounded a death knell were North Carolina's "I-85 district," Louisiana's "mark of Zorro district," Georgia's "march to the sea district," New York's "Bullwinkle district," and Texas's "Mogllianni painting districts."

[19]Representative Melvin Watt, an African-American, who in 1992 and thereafter has been elected to Congress from District 12, provided an example of this view when he testified in the trial of *Shaw v. Hunt* that "representing a district that you are consistent with in your philosophies allows you to be consistent in voting your conscience *without buckling under or catering*, as you said my statement said, to other interests that may not predominate in my district [such as the 'business or *white community*.']" 861 F. Supp. 408, 478, n.5 (E.D.N.C. 1994) (Voorhees, C.J. dissenting) (emphasis and brackets in original).

U.S. 900, 917 (1995). Retreating from *Shaw* would pave the way for the Department of Justice once again to impose its will unduly on legislatures engaged in the next decade's redistricting.

Some amici also attack the holding of *Shaw II* that white plaintiffs have standing to complain about majority-black districts. They fail to recognize that a *Shaw* claim is "analytically distinct" from a vote dilution claim, *Miller*, 515 U.S. at 911 (citation omitted); that the Fourteenth Amendment provides that "no state shall deny to *any person* within its jurisdiction the equal protection of the laws" (emphasis added); and that therefore the race of the plaintiff who brings a *Shaw* challenge is immaterial.[20]

The principles of *Shaw* have also been attacked on the ground that their rigorous application will result in burdensome litigation. However, this criticism fails to take into account that much of the past litigation was caused by the Civil Rights Division's abuse of its preclearance authority. *Cf. Miller*, 515 U.S. at 917. Moreover, now that – "in response to *Shaw I*" – legislators and districts courts nationwide have "reembraced the traditional districting practices that were almost universally followed before the 1990 census," *Vera*, 517 U.S. at 985, the occasion for litigation has been greatly reduced. If North Carolina – where *Shaw* arose – had done the same, there would have been no occasion for the present appeal. It is the State's

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[20]Contrary to the implication in the ACLU brief at 12, nothing in *Shaw* limits its application to majority-black districts. A majority-white district is equally subject to attack if race was the predominant motive for its boundaries – for example, if a district was intentionally "bleached." Indeed, in the pending case of *Daly v. High*, No. 5:97-CV-750-BO (E.D.N.C.), the complaint attacks not only North Carolina's two majority-black districts but also some majority-white districts.

evasion of *Shaw* that has created the problem and generated litigation. In short, those who create the need for litigation by their non-adherence to *Shaw* have no standing to complain about the resulting burden on the courts. This evasion should not be tolerated by this Court.[21] Furthermore, the purported dilemma of legislators caught between the requirements of *Shaw* and the threat of Section 2 litigation has been exaggerated. Legislatures which adhere to traditional districting practices will have few problems so long as they do not divide "geographically compact" groups of minority voters.[22]

B. *Shaw v. Reno* Applies Not Only to Majority-Minority Districts.

Consistent with its refusal to accept the legitimacy of *Shaw* in devising the 1997 plan, the North Carolina General Assembly took the position that *Shaw* applied only to majority-minority districts. Senator Roy Cooper, an attorney who chaired the Senate Redistricting Committee, explained to his fellow senators:

> [W]hen the Court struck down the 12th District it was because the 12th District was majority minority and it said that you cannot use race as the predominate factor in drawing the districts.

[21]In a leading case involving legislative districts, Chief Justice Warren expressed for the Court this view of its responsibility: "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

[22]*See Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), which, under certain conditions, requires majority-minority districts for geographically compact groups of minority voters. In this instance, the legislature may be "race-conscious" in order to avoid splitting such groups.

> Well, guess what! The 12th District, under this plan, is not majority minority. Therefore it is my opinion and the opinion of many lawyers that the test outlined in Shaw v. Hunt will not even be triggered because it is not a majority minority district and you won't even look at the shape of the district in considering whether it is constitutional.

J.A. 132. Likewise, in proposing District 12 to his colleagues, Representative W. Edwin McMahan, who chaired the House Redistricting Committee, stated:

> [It is] not a Majority/Minority District now so shape does not create that – that was the basis the Court used to say this was unconstitutional – not an argument now.

J.A. 121.

This premise – presumably based on advice from the State's Attorney General – is in error.[23] In *Miller*, this Court stated that the plaintiff bears the burden of showing "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." 515 U.S. at 916. Although the Court was discussing Georgia's majority-black districts, the rationale of *Miller* and *Shaw* is not limited to majority-black districts. In *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2195 (1997), the Court's discussion of whether a Florida reapportionment plan subordinated traditional redistricting principles to race does not intimate that the legislative district under attack was immune

[23]In his dissent in the court below, Judge Ervin made the same error. *See* J.A. 30a.

from the application of *Shaw* principles simply because it was "not a majority black district, the black voting-age population being 36.2%." As *Miller* points out, *Shaw* – like *Brown v. Board of Education*, 347 U.S. 483 (1954) and other leading precedents – is based on the idea that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." 515 U.S. at 911 (citations omitted). In creating District 12, the General Assembly moved a "significant number" of African-Americans into District 12 and as an inevitable consequence moved a "significant number" of whites into adjacent districts.[24] These citizens, black and white, were not treated as "individuals" but as components of a racial class – as "mere racial statistics," *see Vera*, 517 U.S. at 985. The very fact that the legislators believed that *Shaw I* did not apply to majority-white districts helps explain the State's claim that the legislators attempted to comply with *Shaw* even though they created an obviously race-based district in violation of traditional districting practices.[25]

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[24]Two major concentrations of African-Americans in the northern part of the state – 70,114 in Guilford County and 43,105 in Forsyth County – were placed in the same district as Mecklenburg County, which is on the South Carolina line. The obvious purpose was to link them with 113,442 African-Americans in Mecklenburg County. The district court's Memorandum Opinion spells out in some detail how this "significant number" of African-Americans were placed – precinct by precinct – in District 12. The maps lodged with the Court by appellees make quite evident the racially motivated placement of "significant numbers" of voters "within or without" District 12.

[25]This fundamental misunderstanding of *Shaw* by the General Assembly contradicts the appellants' assertion that "[t]hese legislators [Representative McMahan and Senator Cooper] testified under oath that they and their colleagues were well aware, when they designed and enacted the 1997 plan, of the constitutional limitations imposed by this Court's decisions in *Shaw* and its progeny. . . ." *See* St. App. Br. 25.

C. The Continuing Evasion of the Principles of *Shaw v. Reno* Should Not Be Tolerated.

Appellants and their allies have consistently derided *Shaw* as being concerned only with "appearances." However, not only do appearances of a district have significance in generating racial perceptions and polarization, *see Shaw I*, 509 U.S. at 647, but also "appearances" help establish the legislative intent. Thus, in *Miller* the Court made clear that appearances together with relevant demographics are an acceptable means of proving a predominant racial motive. *See* 515 U.S. at 905; *cf. Shaw II*. In urging that a direct admission by the legislature of a predominant racial motive is necessary, appellants disregard the Court's own language in *Miller*, which clearly stated that circumstantial evidence was a permissible alternative. Seeking to achieve their objective indirectly, appellants insist that even if a predominant racial motive is clearly revealed by a redistricting plan's shape, demographics, and violation of traditional redistricting principles, summary judgment cannot be entered if two legislators execute affidavits denying a racial motive. Accepting this argument would facilitate the evasion of *Shaw* principles, produce delay, and result in unnecessary trials. Appellants' argument is especially vulnerable when, as here, the overwhelming evidence of racial motivation is *not* "directly contradicted" by the legislators' affidavits[26] and when these affidavits not only lack specificity but also are inconsistent with statements made by the same legislators on the floor of the General Assembly, with the State's own preclearance submission, and with the demographics related to the plan.

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[26]Question 1 in State appellants' brief assumes that plaintiffs' evidence was "directly contradicted" by the affidavits of Senator Cooper and Representative McMahan. As discussed later in detail, this assumption is totally erroneous.

Another means for evading *Shaw* requirements and masking a racial motive is use of the amorphous concept of "functional compactness." Because this concept – unlike geographical compactness[27] – cannot be quantified, it can be employed to conceal the use of racial stereotypes. As employed by the State in the *Shaw* litigation to defend the 1992 plan and now the 1997 plan – and as it has been used to defend other racial gerrymanders – "functional compactness" assumes that blacks who live in one city necessarily have more in common with blacks in another city than they have in common with white neighbors in their own city – even though their white neighbors may work in the same offices and factories as these blacks, shop in the same stores, have children in the same schools, read the same newspapers, watch the same television stations, listen to the same radio stations, have the same local government officials, and serve on the same juries. Contrary to this

[27]The "perimeter measure" and "dispersion measure" of geographical compactness are familiar to this Court and helped demonstrate the lack of compactness of the districts involved in *Shaw II* and *Bush v. Vera*. According to appellants' expert, Dr. Gerald R. Webster, these "[t]wo compactness measures . . . are now among the most commonly recognized and applied by legal and academic scholars." J.S. App. 120a. In this case, they were used by plaintiffs' experts – Dr. Ron Weber, Dr. Timothy O'Rourke, Dr. Thomas Darling, and Dr. Carmen Circinione – in reaching their unanimous opinion that the legislature designed District 12, as well as District 1, with a predominant racial motive. Although "compactness" and "contiguousness" of districts are not constitutional requirements, their absence has equal protection implications, because it contradicts the rationale for having geographically defined districts. *Cf. Reynolds v. Sims*, 377 U.S. at 568, n.21 (Alabama apportionment plan "presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone"); *Drum v. Seawell*, 250 F. Supp. 922, 925 (M.D.N.C. 1966) (setting aside North Carolina's redistricting plan because protection of incumbent congressmen predominated "over the requirements of practicable equality, and we think that compactness and contiguity are aspects of practicable equality").

assumption, few residents of Charlotte – regardless of their race and regardless of their "drive time"[28] to Greensboro and Winston-Salem – would recognize their "functional" identity with residents of Greensboro and Winston-Salem; and vice versa. Moreover, when, as in North Carolina's redistricting, "functional compactness" has been used repeatedly to justify congressional districts in which geographically separated concentrations of blacks are linked together but has not been used to explain how majority-white districts are linked together, this circumstance is added proof of the legislature's disguised racial motive.

D. The *Shaw v. Reno* Requirement of a "Predominant" Racial Motive Should Be Conformed to Other Equal Protection Precedents.

In *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252, 265-66 (1977), this Court ruled that in reviewing legislative or administrative action to determine if it violated equal protection the issue is whether "there is a proof that a discriminating purpose has been a motivating factor in the decision." If so, "judicial deference" to the legislature or administrative body "is no longer justified." *Id, cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*,

[28]Dr. Stuart's affidavit about "average driving times in an automobile" – in which "[n]o allowances were made for possible rush hour traffic congestion" – not only ignores "rush hour congestion" in the cities involved, but also makes no mention of the fact that Charlotte is in one metropolitan area and one media market, while Greensboro and Winston-Salem are in a different metropolitan area and media market. J.S. App. 101a.

471 U.S. 222, 228 (1985). The issue then is whether the same action would have been taken in the absence of the racial motive – whether that motive was a "but for" cause of the action. To promote consistency with these other equal protection cases, appellees submit that the *Shaw* requirement of discriminatory intent should be phrased in terms other than a "predominant racial motive" and that the inquiry should be whether the legislature had a racial motive without which the redistricting plan would not have been enacted. Although avoidance of judicial interference with the authority of state legislatures is an important goal, even more important in our democratic society is preservation of the rights of the voters who elect the state legislators and representatives to Congress. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Shaw I*, 509 U.S. at 639 (quoting *Reynolds*, 377 U.S. at 555). If the *Arlington Heights* test is used to prevent other race-based violations of the right to equal protection, consistency and the avoidance of confusion would dictate that it be used to prevent unconstitutional racial gerrymanders.[29]

E. A Remedial Plan for Violations of *Shaw v. Reno* Requires Especially Demanding Judicial Scrutiny.

After racial segregation in the schools was held by this Court to violate equal protection guarantees, many federal district courts were required to oversee the process of school desegregation. For their guidance, the Court emphasized that once an equal protection violation had been proven, local school

[29]Of course, in this case the district court expressly determined from the uncontroverted material facts that the General Assembly's racial motive was predominant. Obviously the same evidence would establish that, absent the legislature's racial purpose, any redistricting plan enacted would have been quite different.

authorities must "eliminate from the public schools all vestiges of state-imposed segregation." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).[30] In another school desegregation case, the Court made clear that the Dayton Board of Education was "under a continuing duty to eradicate the effects" of segregated schools. *See Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979). Various courts of appeal have rendered decisions to the same effect.[31] Somewhat analogous are cases which discuss the effects of the violation of due process rights by government agents and which hold that confessions are inadmissible if they result from an unconstitutional search or arrest. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200, 216 (1979); *Taylor v. Alabama*, 457 U.S. 687 (1982).

In line with these precedents, it deserves emphasis that the 1997 redistricting plan reviewed by the district court was a "remedial plan" adopted after North Carolina's 1992 plan had been held unconstitutional. Although a legislature must be given

[30]Such "vestiges" include faculty assignments, transportation, student assignments, and "racially-identifiable" schools. *See United States v. Lawrence County Sch. Dist.*, 799 F.2d 1031, 1043 (5th Cir. 1986).

[31]*See, e.g., Brown v. Board of Education*, 892 F.2d 851, 859 (10th Cir. 1989) (defendant Board of Education must prove its efforts to comply with desegregation orders had "eliminated all traces of past intentional desegregation to the maximum feasible extent"); *Taylor v. Ouachita Parish Sch. Bd.*, 648 F.2d 959, 967-68 (5th Cir. 1981) (failure of school authorities to eradicate the "vestiges" of *de jure* segregation is a constitutional violation); *Ross v. Houston Independent Sch. Dist.*, 699 F.2d 218, 225 (5th Cir. 1983) (a school system must "eradicate, root and branch, the weeds of discrimination"); *School Bd. of the City of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987) (once the equal protection violation has been established, plaintiff is "entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants").

a reasonable opportunity to meet constitutional requirements by adopting a substitute measure rather than for a federal court to devise its own plan, *see Wise v. Lipscomb*, 437 U.S. 535, 540 (1978), this is consistent with requiring that district courts examine the remedial plan with special care to assure that no "vestiges" of the unconstitutional racial gerrymander remain and that all "traces" of the earlier predominant racial motive have been rooted out. Moreover, when – as with North Carolina's 1992 and 1997 redistricting plans – a clear resemblance exists between the earlier unconstitutional plan and the remedial plan, *see* J.A 59a and 61a, a plaintiff is entitled to the presumption that "current disparities are causally related" to the earlier gerrymander and the "burden of proving otherwise rests on the defendants." *Cf. School Bd. of the City of Richmond v. Baliles*, 829 F.2d at 1311.

In defending the 1997 plan, appellants insist that their goals were political – to protect incumbents, maintain a partisan balance, and maintain the cores of earlier districts. *See* St. App. Br. at 24-25. However, since all the incumbents were elected pursuant to an unconstitutional plan, their "protection" – to whatever extent it may be related to retaining the "cores" of the districts that elected those incumbents – is the antithesis of eliminating all "vestiges" and "traces" of the 1992 racial gerrymander. The same holds true for "maintaining partisan balance" which was achieved under an unconstitutional plan. The goal of retaining the cores of districts in the 1992 plan is reminiscent of the unsuccessful reliance by the appellants in *Abrams v. Johnson*, 117 S. Ct. 1925 (1997), upon an unconstitutional plan that had been drawn in 1991 to satisfy the Civil Rights Division's unlawful "maximization" policy. As this Court made clear, the baseline for the remedial plan should instead have been the 1982 redistricting plan, which had not been tainted by a predominant racial motive. *See id.* at 1939. Likewise, if the North Carolina General Assembly wished to use

an earlier plan as a baseline, that baseline should have been the plan used for congressional elections in the 1980s – a plan that was not race-driven.

Furthermore, in dealing with a remedial plan, a special danger exists that – as in this case – the legislature will make misleading use of labels and will claim spuriously that a racial gerrymander is a "political" gerrymander. Indeed, if such a defense were accepted uncritically, the corollary would be that in 1997 the General Assembly could have reenacted the original 1992 redistricting plan and then defended it because now its predominant motive was "political" – protecting incumbents and maintaining the existing partisan balance. The "political" defense should be summarily rejected in this case where the "fruit" of an unconstitutional racial gerrymander are used to justify perpetuating that same constitutional violation.[32]

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT THAT NORTH CAROLINA'S TWELFTH CONGRESSIONAL DISTRICT IS UNCONSTITUTIONAL.

Summary judgment is appropriate when no genuine issue exists as to any material fact and on the uncontroverted material facts the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. Proc. 56(c). The moving party is entitled to summary judgment when a rational trier of fact, after considering the record as a whole, could not find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio*

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[32]The logic of the "fruit of the poisonous tree" doctrine – which this Court has applied to protect due process rights, *cf. Wong Sun v. U.S.* – seems equally applicable in preventing violations of equal protection rights.

Corp., 475 U.S. 574, 587 (1986).[33] The moving party must demonstrate the lack of a genuine issue of fact for trial, and if that burden is met, the party opposing the motion must show evidence of a genuine factual dispute. The "quality and quantity of evidence required by the governing law" is to be reviewed on motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). The "mere existence of a scintilla of evidence" for the non-moving party's position is insufficient to defeat a properly supported motion; there must be enough evidence for a reasonable jury to find for the non-moving party. *Id.* at 252; *see also Aleyska Pipeline Serv. Co. v. U.S. E.P.A.*, 856 F.2d 309, 314 (D.C. Cir. 1988) ("a motion for summary judgment adequately underpinned is not defeated simply by a bare opinion or an unaided claim that a factual controversy persists"); *Ross v. Communications Satellite Corp.*, 759 F.2d. 355, 365 (4th Cir. 1985) ("[u]nsupported allegations as to motive do not confer talismanic immunity from Rule 56").

Appellants cannot justly contend that Rule 56(c) was improperly applied against them. The district court specifically placed on the plaintiffs "the burden of proving the race-based motive" and stated that "[i]n the final analysis, the plaintiff must show 'that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *See* J.S. App. 15a (quoting *Shaw II*, 517 U.S. at 905, and *Miller*, 515 U.S. at 916). The district court concluded that, "based on the uncontroverted material facts before it," the General Assembly "utilized race as a predominant factor in drawing" District 12. J.A. 21a-22a. That

[33]If, instead of granting summary judgment, the district court had ruled only on the plaintiffs' motion for preliminary injunction pending a trial, the court would have weighed the probability of plaintiffs' success on the merits, irreparable harm to plaintiffs' rights, injury to defendants, and public interest. *See* 11A Charles A. Wright, et al., *Federal Practice and Procedure*, Sec. 2948.

conclusion was compelled by all the evidence before the court.

A. The Shape and Demographics of North Carolina's Twelfth Congressional District Show Unmistakably That Race Was the Predominant Motive for Its Design.

The district court, viewing the uncontroverted material facts presented by the appellees and recognizing the dangers articulated in *Shaw I*, properly found that "the General Assembly utilized race as the predominant factor in drawing the District, thus violating the rights to equal protection guaranteed in the Constitution to the citizens of District 12." J.S. App. 22a (footnote omitted). In determining that race was "the 'predominant' consideration in drawing the district lines such that 'the legislature subordinate[s] race-neutral districting principles . . . to racial considerations'" J.S. App. 16a (quoting *Miller*, 515 U.S. at 916), the district court observed that "the legislature disregarded traditional districting criteria such as contiguity, geographical integrity, community of interest, and compactness in drawing District 12 in North Carolina's 1997 plan." J.S. App. 22a.

1. Race Dictated the Twelfth District's Bizarre Shape and Lack of Compactness.

A quick glance at the map of District 12 (*see* J.S. App. 15a) reveals that it fails the "eyeball test" and other well-recognized objective tests of compactness.[34] As the district court

[34]The dispersion measure and perimeter measure of compactness developed by Richard Pildes and Richard Niemi in their 1993 Michigan Law Review article, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, have been much used in *Shaw* litigation and in striking down three racially-gerrymandered Texas districts, this Court noted that

pointed out,

> "[w]hen compared to other previously challenged and reconstituted congressional districts in North Carolina, Florida, Georgia, Illinois, and Texas, District 12 does not fare well. The District's dispersion and perimeter compactness indicators (0.109 and 0.041, respectively) are lower than those values for North Carolina's District 1 (0.317 and 0.107 under the 1997 plan). Similarly, the District suffers in comparison to Florida's District 3 (0.136 and 0.05), Georgia's District 2 (0.541 and 0.411) and District 11 (0.444 and 0.259), Illinois' District 4 (0.193 and 0.026), and Texas District 18 (0.335 and 0.151), District 29 (0.384 and 0.178), and District 30 (0.383 and 0.180)."

J.S. App. 20a-21a. According to Professor Timothy G. O'Rourke, "[i]f the 1992 rankings had remained unchanged, the new version of the 12th would still stand as the 430th least compact district on the dispersion measure and it would rank 423 on the perimeter measure." J.A. 249.[35] Professor Weber, who has provided current rankings based on changes made to other districts, states that "North Carolina 12 ranks either 430 or 431 out of 435 in compactness using the dispersion measure" and "either 432 or 433 of 435 in compactness using the perimeter measure." J.A. 213. As these numbers make clear, "customary and traditional districting practices" have been

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they were among the twenty-eight least compact in the nation when these measures were applied. *See Bush v. Vera*, 517 U.S. 952 (1996).

[35]Of course, since several districts have changed since 1992 as a result of post *Shaw I* litigation, the actual compactness rankings of District 12 would now rank even lower in any comparison of compactness.

utterly disregarded and District 12 constitutes an "extreme instance of gerrymandering." *See Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring).

The State's Section 5 submission recites that "geographic compactness" was one of five factors emphasized "in locating and shaping the new districts." J.S. at 63a. This assertion is misleading and inconsistent with the facts regarding District 12. This inconsistency suggests that in the preclearance submission State officials sought to conceal the General Assembly's race-based purpose – a concealment which itself provides evidence of that purpose. Likewise, making other districts "geographically compact" but not doing so for District 12 helps prove that this district was different from others – namely, that District 12 was the product of a race-based intent.

In *Lawyer*, the Court pointed out that the senatorial district under attack "is located entirely in the Tampa Bay area, has an end-to-end distance no greater than that of most Florida Senate districts, and in shape does not stand out as different from numerous other Florida House and Senate districts." 117 S. Ct. at 2194-95. Moreover, while that district "crosses a body of water and encompasses portions of three counties, evidence submitted showed that both features are common characteristics of Florida legislative districts, being products of the State's geography and the fact that 40 Senate districts are superimposed on 67 counties." *Id.* On the other hand, North Carolina's District 12 is not "located entirely" in a single metropolitan area, and its shape surely does "stand out as different from" all other North Carolina congressional districts. In fact, the only other North Carolina districts with irregular boundaries are District 1, which is race-based, and those districts which have boundaries coinciding with District 12 or District 1. Unlike *Lawyer*, where the senatorial district under attack was on both sides of Tampa Bay, the bizarreness of District 12 is not a "product" of North

Carolina's geography; nor does it result from the fact that twelve congressional districts are "superimposed" on one hundred counties.

As this Court explained in *Miller*, "[s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." 515 U.S. at 913; *see also Karcher v. Daggett*, 462 U.S. 725, 755 (1983) ("dramatically irregular shapes may have sufficient probative force to call for an explanation"). In this case, the only "explanation" for the shape and demographics of District 12 is that race was used for its own sake.

The maps and data presented to the district court showed that District 12 meanders though six counties, splitting each along racial lines to pick up virtually every precinct in those counties with a black population over forty percent. *See* J.A. 183. Seventy-five percent of the total population of District 12 comes from parts of Mecklenburg, Forsyth and Guilford Counties which are majority black. *See* J.A. 176. These three population centers are also at the extremes of the District – Mecklenburg at the southern and Forsyth and Guilford at the northern. Forsyth County is divided so that 72.9 percent of the total population allocated to District 12 is African-American, while only 11.1 percent of the total population assigned to District 5 is African-American. *See id.* In Mecklenburg county, 51.9 percent of the total population allocated to District 12 is African-American, while only 7.2 percent of the total population assigned to District 9 is African-American. *See id.* Finally, in Guilford County, 51.5 percent of the total population allocated to District 12 is African-American, while only 10.2 percent of the total population assigned to adjacent District 9 is African-

American. *See* J.A. 183. For any resident of those three counties, the inevitable perception would be that District 12 is race-based.

In *Vera*, when describing the shape of a section of a district held to be unconstitutional, this Court stated that, "the northernmost hook of the district, where it ventures into Collin County, is tailored perfectly to maximize minority population." 517 U.S. at 971. This description aptly describes how District 12 slithers into Forsyth County to extract all precincts but one with an African-American population in excess of forty percent. *See* map, Exhibit O. From Forsyth County, only two precincts with an African-American population of less than forty percent were included in District 12; and those two precincts were at the gateway for District 12's entry into Forsyth from the south. *See* map, Exhibit O.

According to the State's preclearance submission, "functional compactness (grouping together citizens of like interest and needs)" was another of five factors employed in shaping the districts. In this context, "functional compactness" is apparently another name for "community of interest." It calls to mind this Court's observation in *Miller*: "Nor can the State's districting legislation be rescued by mere recitation of purported communities of interest." 515 U.S. at 919. The legislative history of the 1997 plan gives no specifics as to any real communities of interest present in District 12. The fact that many residents of District 12 live in cities in the northern part of the state and many others live in a city in the southern part of the State does not give rise to any "community of interest" – especially since the first group is in the Piedmont Triad metropolitan area and the second is in the Charlotte metropolitan area. Once again the State's concealment of motive by citing a non-existent "factor" is an admission by conduct that helps prove the plaintiffs' case.

2. Contiguity Was Subordinated to Racial Considerations.

A narrow land bridge, located in the south-central portion of Mecklenburg County, prevents District 12 from completely dividing both Mecklenburg County and adjacent District 9. This bridge was created by splitting Precinct 77 in such a way that a section less than two miles wide and containing only one of the precinct's 3,462 residents was placed outside District 12. Thus, a single person provides a "human link" so that District 12 does not sever adjacent District 9 and Mecklenburg County into two non-contiguous parts.[36] *See* J.A. 250.[37] Moreover, in several areas District 12 narrows to one precinct wide as it winds through counties, cities and towns to achieve its race-based goal. *See* map, Exhibit M. These narrow corridors enable the district to stretch from Charlotte to Greensboro but minimize the number of "filler" people in between.

3. Political Subdivisions and Actual Communities of Interest Were Subordinated to Racial Considerations.

Despite their claimed goal of "avoidance of the division of counties and precincts," J.S. App. 63a, the General Assembly demonstrated little respect for political subdivisions in creating District 12 and often divided them on the basis of race. The district court described how counties were split in the design of District 12:

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[36]Since Precinct 77 contains a substantial percentage of African-Americans, the legislature obviously did not want to put the whole precinct into District 9.

[37]The one person in Precinct 77 who was placed in District 9 cannot cast a secret ballot in a congressional election.

> District 12 is composed of six counties, all of them split in the 1997 plan. The racial composition of the parts of the six sub-divided counties assigned to District 12 include three with parts over 50 percent African-American, and three in which the African-American percentage is under 50 percent. However, almost 75 percent of the total population in District 12 comes from the three county parts which are majority African-American in population: Mecklenburg, Forsyth, and Guilford counties. The other three county parts (Davidson, Iredell, and Rowan) have narrow corridors which pick up as many African-Americans as are needed for the district to reach its ideal size.
>
> Where Forsyth County was split, 72.9 percent of the total population of Forsyth County allocated to District 12 is African-American, while only 11.1 percent of its total population assigned to neighboring District 5 is African-American. Similarly, Mecklenburg County is split so 51.9 percent of its total population allocated to District 12 is African-American, while only 7.2 percent of the total population assigned to adjoining District 9 is African-American.

J.S. App. 6a-7a. District 12 is the only district in North Carolina with no intact counties. As Professor Weber stated in his affidavit, "[n]o single district in the country is like North Carolina 12 in splitting as many as six counties and subdividing 100 percent of them." J.A. 209. As the district court noted, cities, like counties, were split along racial lines in creating

District 12. *See* J.S.App. at 7a. According to Professor Weber, 9 of 13 cities or towns – including the four largest cities – were split along racial lines to create District 12. *See* J.A. 184.

B. District 12 Cannot Be Justified By Means of a Spurious Claim that It Was Created with a Political, Rather than Racial, Motive.

Question 2 in State appellants' brief implies that the district court improperly relied on "isolated and sporadic party registration data" when it should have focused on "actual voting results." However, the district court can not be criticized for closely scrutinizing voter registration data because, prior to the March 31 hearing, the defendants had represented to the court that "[t]he leaders of the House and Senate Committee also *had available, and used, voting behavior information consisting of precinct level voter registration data* and the results of the 1990 U.S. Senate election and the 1988 Lt. Governor and Court of Appeals elections." Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Their Cross-Motion for Summary Judgment 7 (emphasis added). This voter registration data was readily available to any member of the General Assembly through its public access computer; moreover, "redistricting legislatures will . . . almost always be aware of racial demographics." *See Miller*, 515 U.S. at 916.

Instead of being "sporadic and isolated," the registration data was quite comprehensive and demonstrated conclusively that in Guilford, Forsyth, and Mecklenburg counties many precincts adjacent to District 12 had high Democratic registration but low percentages of African-Americans and that the exclusion of these precincts from District 12 was clearly attributable to race – not party. As the district court explained:

> the legislature did not simply create a majority-Democratic district amidst surrounding Republican precincts. For example, around the Southwest edge of District 12 (in Mecklenburg County), the legislature included within the district's borders several precincts with racial compositions of 40 to 100 percent African-American; while excluding from the district voting precincts with less than 35 percent African-American population, but heavily Democratic voting registrations.

J.S.App. at 8a. This pattern was repeated in Forsyth and Guilford Counties. *Id.* These and other undisputed facts convinced the district court that "District 12 was drawn to collect precincts with high racial identification rather than political identification." *Id.* at 21a.

In *Vera*, when reviewing Houston districts held unconstitutional, this Court stated that the "district lines correlate almost perfectly with race, while both districts are similarly solidly Democratic." 517 U.S. at 975. North Carolina's registration data shows that the lines dividing precincts of District 12 from the previously mentioned precincts of other districts "correlate almost perfectly with race;" however, both the black precincts within District 12 and the white precincts adjacent to District 12 are "solidly Democratic." As in Texas, this correlation suggests that race was the predominant motive for the district boundaries, but that appellants attempted to conceal this motive by referring to party data.

No one questions that for several decades a very high percentage of African-Americans in North Carolina have registered as Democrats. In the trial of *Shaw v. Hunt*, Melvin Watt, an African-American who has represented District 12 in Congress since 1992, testified that "95% or higher of the

African-Americans registered to vote in North Carolina are registered as Democrats." J.A. 158. Likewise, Gerry Cohen, the staff member of the General Assembly who played the greatest role in redistricting for the General Assembly, testified that in "urban areas" the percentage was 95 percent, but in "rural areas" the percentage was 97 to 98 percent. *Id.* Under these circumstances, legislators can easily claim that any district with a high percentage of blacks was drawn for "political" purposes to obtain Democratic votes. In his affidavit, Dr. Peterson – although admitting the high correlation of District 12's boundaries with race – emphasizes instead the correlation of its boundaries with Democratic party registration and Democratic performance. Because typically the number of black registered voters is exceeded by the number of voters registered as Democrats, he reasons that District 12 was designed with a political, rather than a racial, motive. If, however, more than 95% of the black voters have registered as Democrats, the number of registered Democrats in a precinct will exceed the number of registered blacks – unless white registered voters have registered almost exclusively as Republicans or independents. Thus, the party correlation discussed by Dr. Peterson is misleading and has no significance.

In light of the district's history, it seems obvious that the legislators were assuming that to concentrate large numbers of blacks in the "new" District 12 would guarantee that a black candidate who ran for office would receive a majority in the Democratic primary because of the large number of black voters registered as Democrats. Their second assumption was that the black Democratic nominee then would be elected because he or she had a solid core of support based on the racial loyalty of fellow African-Americans and the party loyalty of some white Democrats. In making these two assumptions the General Assembly relied on "racial stereotypes" and treated a "significant number" of black voters as "mere racial statistics."

Thereby they violated the precepts of *Shaw I*.

Appellants complain that the district court should have used "actual election results" instead of "party registration data."[38] The General Assembly had available the "actual election results" of three statewide elections; and even though State appellants intimate that additional "results" should have been reviewed by the district court, they have given no indication what those result are or how they should be analyzed. Moreover, the court had before it evidence of "actual election results" with exhibits[39] that presented detailed statistical information concerning nine precincts in Mecklenburg, Forsyth and Guilford counties – including, but not limited to, party affiliation, race, and election results of the 1990 Senatorial race, the 1988 race for lieutenant governor and one 1988 Court of Appeals race. All these precincts are contiguous to District 12; and eight are cited by the district court as examples of precincts that should have been included within District 12, if the General Assembly truly were attempting to create a "Democratic island in a largely Republican sea."[40] All nine precincts have an African-American population below 35% and a Democratic registration rate above 50%. Most of these nine precincts,

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[38]Specifically, State appellants contend that the

> district court focused on a handful of precincts that border District 12, but were not included in the district despite having Democratic voter-registration majorities, *even though the registered Democrats in these districts (sic) consistently voted Republican.*

St. App. Br. 29 (emphasis added).

[39]*See* Exhibits A through I of the exhibits to the Affidavit of Martin B. McGee.

[40]This is the phrase used by Senator Cooper in his affidavit to describe the purpose of District 12. J.S. App. 77a.

however, have a minority population under twenty percent and a Democratic registration rate above sixty percent. Using the election results of the three political races listed above in these nine precincts, there are an aggregate of twenty-seven separate election results by which one could classify these precincts as either Democratic or Republican. The Democratic candidate won in 24 out of 27 contests. Moreover, in many instances the percentage of votes the Democratic candidate received in a precinct was *higher* than the percentage of registered Democrats in that precinct.

The State appellants argue that the district court "concentrated on only 32 excluded precincts with Democratic voter-registration majorities" instead of focusing on the district as a whole. St. App. Br. 35. As has just been pointed out, the court had before it information concerning nine precincts adjacent to District 12 in which the Democratic candidate won in 24 out of 27 contests, but had a black population of less than 35%. Within these precincts reside a total of 31,130 persons whose precinct was assigned to a district other than District 12 for predominantly racial purposes. That purpose was to permit the inclusion within District 12 of other precincts having a higher percentage of African-Americans and yet to comply with the constitutional requirement of equipopulousness. This movement of more than 31,000 persons "without" District 12 and the movement of a like number "within" District 12, constitutes the placement of "a significant number of voters" in which "race was the predominant factor" and is itself enough to invalidate the district. *See Miller*, 515 U.S. at 917.

State appellants also fail to recognize that the "results" of the three elections as to which the General Assembly was provided information reveal that race *was* used as a proxy for achieving the intended result. *Cf. Vera*, 517 U.S. at 969. They show that in the 1990 election in which Harvey Gantt, an

African-American, ran as the Democratic nominee for the Senate against well-known three-term incumbent Jesse Helms, Gantt obtained 66.49% of the vote in the 1997 plan's District 12. On the other hand, in 1988, when Tony Rand, a white Democrat, ran for Lt. Governor against white Republican Jim Gardner – neither being an incumbent – Rand received only 62.08% of the vote in District 12. In the 1988 State-wide race for the Court of Appeals, John Lewis, the white Democratic candidate, received a majority of only 61.54% in District 12 against the white Republican candidate. These results strongly indicate that – just as the registration data suggests – the "new" District 12 would be safer for an African-American Democratic candidate than for a white Democratic candidate. It would be especially safe for incumbent Melvin Watt, an African-American who had already been elected three times to Congress from the "old" racially gerrymandered Twelfth District.

At the March 31 hearing, appellees submitted that race was the predominant motive not only for District 12 but also for District 1. The shape and demographics of District 1 provide strong support for that contention. Moreover, the legislative history of District 1 indicates that its distorted shape reflects the purpose to create a majority-black district at all costs in order to obtain preclearance and insure the reelection of Representative Eva Clayton, an African-American who had been elected from District 1 under the 1992 plan. Nevertheless, the district court declined to enter summary judgment for the plaintiffs as to District 1. Judge Ervin's dissent finds an inconsistency between the district court's invalidating District 12 and not doing so as to District 1. Whatever the reason for the district court's charitable treatment of District1,[41] the failure to enter summary judgment

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[41]The district court may have hoped that the legislature, when drawing a new plan, would note some of the concerns expressed by the court as to District 1. If so, its optimism was ill-founded, for the 1998 plan

as to the district is not material evidence of the legislature's motive in drawing District 12.

C. The Affidavits of Legislators of McMahan and Cooper Do Not Create Any Material Issue of Fact.

In their brief, State appellants rely on the affidavits of two legislators, Senator Cooper and Representative McMahan, as grounds for setting aside the summary judgment.[42] This reliance is inconsistent with the contention they made to the district court that a legislator's affidavit is incompetent to show legislative intent.[43] Even assuming arguendo that the affidavits

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made no change whatsoever in District 1. Had the court determined on motion for summary judgment that District 1 was race-based, an issue of strict scrutiny might have arisen. The State's preclearance submission was perhaps seeking to anticipate that issue when it noted that only in northeastern North Carolina could a geographically compact majority-black district be created. Professor O'Rourke's affidavit questions whether such a district can be created anywhere in North Carolina; and after six years of litigation concerning North Carolina's racial gerrymanders, appellees are still waiting for appellants to produce a map of a majority-black district anywhere in North Carolina that would be "geographically compact."

[42]*See* question 1, St. App. Br. i.

[43]In a brief before the March 31, 1998 hearing, appellants contended that the affidavit of Representative John Weatherly, who served in the General Assembly when the 1997 plan was drawn, was inadmissible:

> to prove the legislature's motivation in enacting the 1997 Congressional plan and must be struck. It is a long standing rule of law in North Carolina that the affidavit or testimony of a member of the legislature may not be relied upon to prove legislative intent. *D & W, Inc. v. City of Charlotte*, 268 N.C. 577, 581-82, 151 S.E.2d 241, 244 (1966). A statute '"is an act of the legislature as an organized body" and it "expresses the collective will of that body" so that the understanding of a single member

of these two legislators are competent,[44] they give no insight into the "collective will" of the General Assembly. Indeed, only statements made by legislators during official legislative sessions or committee meetings merit any consideration in determining the motive for the redistricting plan.

Addressing the North Carolina House of Representatives on March 26, 1997, Representative McMahan, its Redistricting Committee Chairman, explained that the plan was "based on geographic compactness, racial fairness, population that is homogeneously compatible, incumbency friendly, and would divide the fewest number of counties and precincts as possible. The Current Plan divides 45 counties and 80 precincts – new Plan divides 22 counties and only 2 precincts." J.A. 120. He did not mention that, just as the "old" District 12 split all 10 of its counties, the "new" District 12 split six out of six counties, or that District 12 would still be almost at the bottom of the

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> may not be accepted by the Court to ascertain the legislative intent. *Id. See also Milk Comm'n v. National Food Stores*, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967) (testimony or affidavits of members of the legislature are not competent evidence of legislative intent and must be disregarded). Because North Carolina law provides that the affidavit of an individual member of the General Assembly is inadmissible and cannot be relied upon to prove legislative intent, the affidavit of Representative Weatherly attempting to establish the legislature's motive in drawing Districts 1 and 12 must be struck. *Empire Distribs. of N.C. v. Schieffelin & Co.*, 679 F. Supp. 541 (W.D.N.C. 1987).

J.A. 145-46.

[44]There is authority that individual legislators are incompetent to testify regarding the intent of the legislative body. *See, e.g., Bread Political Action Comm. v. Fed. Election Comm.*, 455 U.S. 577, 582 n.3 (1982); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

nation's districts in "geographical compactness." As to District 12, McMahan explained that because it was no longer majority-minority, its shape was irrelevant in deciding its constitutionality; that the "[p]opulation in 12 has homogeneous interest – comprised of many citizens living in an urban setting"; and that it was "[d]rawn to protect the Democratic incumbent." J.A. 121.

In presenting the redistricting plan to the Senate on March 27, 1997, Senator Cooper, Chair of the Redistricting Committee, noted that the 1992 plan was "a geographic mess" and from maps on the desks of his fellow senators, they "can see how difficult it is for people to know in which congressional district they reside." He contended that the new plan "provides for geographical compactness, provides for consideration of community of interest, and provides for fair partisan balance." J.A. 130-31. Although Cooper thought that "all of the congressional districts would be competitive," he predicted that the plan "would elect six Democrats and six Republicans. We said from the beginning in the Senate that in 1996 the people made a decision to elect six members of Congress from the Democratic party and six members of Congress from the Republican party and we should not use court-ordered redistricting to alter that result." J.A. 131. After expressing his view that the "shape test" would not apply to District 12 because it was no longer majority-black, he observed that the district now was "much more compact." *See* J.A. 132-33. Senator Cooper commented that "we have preserved the current partisan nature of each of the districts and for that reason I think all of the incumbents are satisfied." J.A. 133. Understandably, incumbent Representative Melvin Watt would be "satisfied." The shape of District 12 virtually guaranteed that he would not face any opponents in the primary and that he would have a substantial edge in the general election. Senator Cooper added that "this is not an incumbent protection plan. This is a plan that attempts to

preserve the partisan nature of each of the twelve districts as they now exist." *Id.* This comment seems intended to obfuscate the fact that, in the context of a six-to-six partisan balance in North Carolina's congressional districts, "to preserve the partisan nature" – or "fair partisan balance," *see* J.A. 131 – equates to "incumbent protection."

The language used by Representative McMahan and Senator Cooper on the floor of the General Assembly does not contradict the evidence offered by plaintiffs which clearly established the racial purpose for creating District 12. Representative McMahan specifically stated that this district was drawn to protect the Democratic incumbent. J.A. 121. Since this incumbent was an African-American who had been elected three times from an unconstitutional race-based district and the General Assembly attempted to protect that incumbent by creating an irregularly shaped 46.47% African-American district, McMahan's statements to his fellow legislators actually confirm plaintiffs' case. The same is true of Senator Cooper's statements – although he, unlike Representative McMahan, is an attorney, and he used more artful language both on the floor and in his affidavit.

The references to geographic compactness in the statements by McMahan and Cooper on the floor intimated that this compactness had been achieved. Subsequently, the State's Section 5 submission also indicated that geographic compactness was a feature of the plan and did not mention that North Carolina's District 12 is still one of the least compact in the United States. These misleading statements constitute further admissions by conduct, which are evidence of the intent to mislead others as to the redistricting plan's purpose and to disguise the racial motive.

Especially revealing of legislative intent is the

preclearance submission's account of events that preceded consideration of the 1997 plan by the House of Representatives. Two prominent African-American legislators – Representatives Michaux and Fitch – proposed three alternative redistricting plans, which, in addition to a majority-black district in northeastern North Carolina, contained three "minority influence districts." In discussing the House's rejection of these proposals, the State's own Section 5 submission states:

> all three plans would seriously weaken the ability of the African-American incumbent in District 12 (Congressman Watt) to win re-election. The African-American percentage in District 12 is only 37.66 percent in Plans B and C and 37.44 percent in Plan A --- approximately nine percent lower than the African-American percentage of District 12 in the enacted plan (46.67%).

J.A. 94-95. Significantly, this discussion is in terms of race – not political party.[45] The situation is remarkably similar to that

[45]There is also direct evidence of legislative intent as a result of similar conversations and debates in the General Assembly concerning District 12 in the State's Section 5 submission – which was filed by the State appellants in the district court. For example, Representative McMahan explained his negotiations with Senator Cooper concerning various proposed plans for District 12 in racial – not political – terms when he told his fellow legislators that "we've actually agreed to increase the percent of minorities in District 12 to 46% and are now basically following the Senate plan on District 1 and 12." *See* North Carolina Section 5 Submission 1997 Congressional Redistricting Plan, Vol. 5, Attachment 97C-28F(3) at 3. Linwood Jones, a House staff member working on the 1997 plan, explained a detour into Statesville in racial – not political – terms when he stated: "In Iredell we have gone into Statesville, which I believed picked up the minority percentage of District 12 – we came a little bit more out of southern Rowan when we did that." *Id.*, Attachment 97C-28F-4E(4) at 3-4. Representative McMahan explained a minority candidate's prospects in District 12 in racial – not political – terms when he

in *Vera*, where the legislature's rejection of a more compact district was asserted to be for political reasons at trial, but the explanation for the rejection of the offered plan in the State's Section 5 submission was "in exclusively racial terms." *See* 517 U.S. at 969. The proper inference is that inclusion of a high percentage of African-Americans in the district was important in and of itself. In this context the African-Americans included in District 12 became "mere racial statistics." *Id* at 985. Moreover, the "approximately nine percent" to which the submission refers equates to 50,000 African-Americans – which is a "significant number."

D. The District Court Had No Occasion To Discuss Strict Scrutiny.

Nothing in State appellants' Jurisdictional Statement presented any claim that, after determining that District 12 was race-based, the district court should have provided them an opportunity to prove that the district could survive strict scrutiny. Likewise, the State appellants' brief on the merits makes no such contention. The reason for this omission is obvious. Having asserted that no racial motive existed for the design of District 12, appellants could hardly claim that its strange shape reflected a "compelling governmental interest" or

stated: "As far as District 12 – I believe, again, that Congressman Mel Watt is very comfortable and anyone else that might choose as a minority to run in that district should be very, very comfortable – when there is 46.5% of the people in that District are also minorities – that they could win." *See Id.*, Attachment 97C-28F(1) at 16. Finally, in summarizing the proposed plan to the House Redistricting Committee, Representative McMahan stated: "I am confident that we have done our best - our dead level best - to draw two districts that are fair racially and do have one of them the majority of the population and other one over 46%, and that's the very best we could do on both sides, and we look at this very, very closely – obviously – and the very best we could do and yet create Districts that we felt would be acceptable to the Department of Justice and to the Court." *Id.* at 23.

was the product of "narrow tailoring." Indeed, in claiming that the redistricting plan was primarily for protecting incumbents and maintaining partisan balance, the appellants have made clear that no grounds exist for finding that District 12 could survive strict scrutiny. By their own implied admissions, appellants removed from the case any question as to whether District 12 – having been found race-based – could then pass the test of strict scrutiny.

Furthermore, once plaintiffs proved the predominant racial motive for District 12, the defendants had the burden of producing evidence – and probably the burden of persuasion as well – on issues of "compelling interest" and "narrow tailoring." They produced no such evidence at the hearing, and requested no findings thereon. Appellees question whether the intervenor-appellants or amici have any standing now to complain – after a hearing to which they were not parties – that the district court's Memorandum Opinion made no explicit finding that District 12 failed strict scrutiny. In any event, nothing in this record even remotely suggests that the evidence before the court raised any issue of fact or law as to strict scrutiny.[46] The possible "compelling governmental interests" which are suggested by the intervenor-appellants' brief at 40-41 and by the Lawyers' Committee for Civil Rights Under Law amicus brief at 23-26 are too unrelated to the facts of this case to merit serious consideration. For example, the suggestion that a Section 2 violation might have resulted if the African-Americans in Guilford and Forsyth counties had not been linked with those in Mecklenburg County is implausible in view of the distances and different metropolitan areas involved. Furthermore, like the argument made in this Court concerning District 12's predecessor, any argument that the "new" District 12 is

[46]In his dissent, Judge Ervin does not even intimate that District 12, if race-based, might survive strict scrutiny.

"narrowly tailored" would be "singularly unpersuasive." *See Shaw II*, 517 U.S. at 917.

E. The Summary Judgment Also Was Proper on Other Grounds.

The shape and demographics of the 1992 redistricting plan reflected clearly its dominant race-based purpose. District 12 in that plan obviously was designed to assure the election of an African-American to Congress, just as was District 1. The "packing" of blacks into these two districts had the effect of "bleaching" the other 10 districts and assuring that voters in those districts would elect whites to represent them in Congress. The unspoken assumption was that the two African-American Representatives would represent the blacks of the State and the other ten Representatives would represent the whites. *See Shaw I*, 509 U.S. at 648. In substance, the plan had a racial quota based on North Carolina's 22% African-American population.

After the unconstitutional 1992 plan – which was used for three elections with the anticipated electoral results – had been held unconstitutional, the General Assembly was given the opportunity to prepare a remedial plan.[47] That plan supposedly was to remedy the constitutional defects of its predecessor. However, a simple comparison of the maps showing the 1992 and 1997 plans, J.A. 59a and 61a, reveals that the new plan is not an adequate remedy. Especially with respect to District 12, the resemblance of the "new" to the "old" is too great to be

[47]In this instance, the remedial plan was prepared after a judicial holding that the existing plan was unconstitutional. In *Lawyer*, there had been no judicial determination that the plan being replaced was unconstitutional.

permitted.[48] The plan creates a district in which 46.67% of the population is African-American – even though only 22% of the total population of North Carolina is African-American and they are "relatively dispersed." *Shaw I*, 517 U.S. at 634. District 12 continues to violate traditional districting principles – such as geographical compactness and avoidance of divided political subdivisions. There is no "community of interest" between residents of Charlotte – at the southern extreme of the district – and those in Winston-Salem, Greensboro and High Point – at the northern extreme of the district. Likewise, there is no "community of interest" between residents of these cities and residents of the rural areas that lie between these cities.

It is well recognized that "the historical background" of a legislative decision can be a helpful "evidentiary source" as to the purposes of the decision. *See Arlington Heights*, 429 U.S. at 267. The history of the creation of the "old" District 12 and the statements made in the General Assembly concerning the "incumbent protection" goal of the "new" District 12 generate the presumption that in the 1997 plan this district was formed with a specific purpose of ensuring that an African-American would be elected to Congress. More specifically, the purpose was to ensure that the voters in this district would reelect to Congress Melvin Watt, an African-American who for three terms was elected from the preceding flagrantly gerrymandered District 12.[49] Under these circumstances, the district court could

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[48]Representative Michaux, in purposing an alternative plan, observed, "all you have done with the 12th District in this bill is knock sixty miles off of it." North Carolina's Section 5 Submission 1997 Congressional Redistricting Plan, Vol. 5, Attachment 97C-28F-4F(1) at 12.

[49]How Representative Watt has performed his duties in Congress during his three terms is irrelevant in the present context and is for voters to decide when and if he runs for office from a properly drawn district. The issue instead concerns the means used to place him, and keep him, in office.

not properly allow the 1997 plan to be used. Even if the court had not found specifically – on the basis of overwhelming and uncontroverted evidence – that the 1997 plan was race-based, the court had a duty to set it aside. Otherwise, the judicial decision declaring the 1992 plan unconstitutional would become only an empty gesture lacking real effect. Obviously this would encourage future evasions of *Shaw v. Reno* by North Carolina – as well as by other states when the next round of redistricting occurs – and it would add to voters' cynicism about both the legislative process and the judicial process.

Representative McMahan and Senator Cooper, the Chairs of the General Assembly's redistricting committees, spoke to their fellow legislators about the goal of preserving the "cores" of the 1992 districts. Retaining the "core" of a district like District 12 that was created with a predominant racial motive is irreconcilable with remedying the replaced district's violation of equal protection rights. The common sense rationale for the "fruit of the poisonous tree" doctrine – a doctrine which this Court has used to protect due process rights in criminal cases – is equally applicable here and would fully justify the entry of summary judgment against District 12, with or without a specific finding as to the race-based motive for its design. As this Court has recognized in *Shaw* and its successor cases, this is one area in which "appearances" are important, because of the perceptions they generate that the legislature is using race as a basis for awarding political offices. Until and unless traditional districting principles are used in redrawing District 12, its "appearance" will continue to generate the perception that it is predominantly race-based. This perception in turn will generate further public distrust of the elections and a lack of interest in an electoral process in which the results appear to be predetermined. Therefore, appellees submit that as a threshold test for approval of a remedial plan, the plan must comply with traditional redistricting principles – regardless of

motive of the legislature. This would facilitate the judicial review of remedial plans and give legislators the guidance which the State appellants have repeatedly claimed to be seeking. The suggested test is not unduly burdensome for, as Justice O'Connor has pointed out, "legislators and district courts nationwide" have already "reembraced the traditional districting practices that were almost universally followed before the 1990 census." *See Vera*, 517 U.S. at 985. The General Assembly deserves no reward for its failure to understand the clear message of *Shaw v. Reno* and for lagging behind in returning to "traditional districting practices."

The legislative history makes clear that District 12 preserved the "core" of an unconstitutional district. Moreover, it violated traditional districting principles and thereby perpetuated the "appearance" of a quota system for representation in Congress. District 12 is the "fruit" of the violations of equal protection in the 1992 plan, rather than a remedy for its constitutional defects. For these reasons, the district court could have properly entered summary judgment without ever engaging in its painstaking examination of the General Assembly's race-based motive.

CONCLUSION

The evidence before the district court was overwhelming and undisputed. The court properly determined that the material facts were uncontroverted and that no issue of fact existed as to the General Assembly's predominant racial motive in configuring District 12. Neither at the March 31 hearing nor on appeal have the State appellants claimed that District 12 could withstand strict scrutiny; and their own evidence establishes conclusively that no "compelling governmental interest" dictated the drawing of this misshaped district. Moreover, the General Assembly's retention of the "core" of the preceding racially

gerrymandered District 12 and its continued rejection of traditional districting principles in configuring the "new" District 12 required the district court to enter summary judgment enjoining use of the 1997 redistricting plan.[50] Therefore, the summary judgment entered by the district court was not in error and should be affirmed.

Respectfully submitted,

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[50]Granting summary judgment in this case – a case in which a remedial plan was enacted after this Court had found the earlier plan to be unconstitutional – is even more appropriate than the granting of the summary judgment in *Diaz v. Silver*, 978 F.Supp. 96 (E.D.N.Y. 1997), *aff'd* 118 S.Ct. 36 (1997).